

STATE OF MICHIGAN  
COURT OF APPEALS

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MICHAEL DOUGLAS SMITH, JR., Personal  
Representative of the Estate of SHANNON  
LOUISE RANDOLPH, Deceased,

UNPUBLISHED  
March 24, 2005

Plaintiff-Appellee,

v

THOMAS RANDOLPH, JR.,

No. 251066  
Wayne Circuit Court  
LC No. 02-235928-NO

Defendant-Appellant.

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Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right an order denying his motion for summary disposition pursuant to MCR 2.116(C)(7)(claim barred by the statute of limitations), granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10), and entering judgment in favor of plaintiff for \$750,000. We affirm in part and reverse and remand in part.

Plaintiff commenced this wrongful-death action on October 4, 2002, alleging that defendant was liable for the January 8, 1982, shooting death of plaintiff's decedent, who was defendant's wife.<sup>1</sup> Defendant first argues that the trial court erred in determining that plaintiff's action was not barred by the statute of limitations. We disagree, but for reasons other than those stated by the trial court and argued by plaintiff.

The limitations period for a wrongful-death action is three years. MCL 600.5805(10). Because plaintiff's decedent was fatally shot on January 8, 1982, and plaintiff did not file this action until October 4, 2002, the cause of action was prima facie barred. Therefore, plaintiff had the burden of showing the facts necessary to avoid the operation of the statute of limitations. *Warren Consolidated Schools v W R Grace & Co*, 205 Mich App 580, 583; 518 NW2d 508 (1994). In response to defendant's motion for summary disposition, plaintiff relied in part on the fraudulent concealment statute, MCL 600.5855, which provides:

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<sup>1</sup> Plaintiff is the adult child of the deceased.

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Plaintiff argued, and the trial court agreed, that this statute was applicable and that the two-year limitations period did not begin to run until November 19, 2001, which was the date that defendant was convicted of decedent's murder.

To seek recourse under the fraudulent concealment statute, plaintiff was required to plead in his complaint the acts or misrepresentations that comprised the fraudulent concealment, and he had to prove that defendant "committed affirmative acts of misrepresentations that were designed to prevent subsequent discovery." *Phinney v Perlmutter*, 222 Mich App 513, 562-563; 564 NW2d 532 (1997). We find that plaintiff's complaint sufficiently referenced acts and misrepresentations giving rise to fraudulent concealment. The complaint alleged that defendant gave police an account of the crime that was illogical and which contained inconsistencies. Plaintiff further alleged that defendant had his wife's remains cremated over the objection of family members. Additionally, it was alleged that defendant sued the shopping mall where the murder was committed and that he settled the suit in 1983 for more than \$70,000. Finally, plaintiff alleged that in December 1999, a person, not defendant, came forward with information implicating defendant in the crime. In sum, these allegations suggest that defendant lied to the police about the murder, that defendant hoped to hamper further investigation by having the body cremated, that defendant successfully sought to hold others civilly liable for the homicide while hiding his own duplicitous involvement, that defendant did not reveal his involvement in the murder, and that it took police contact by another person to initiate the prosecution. Therefore, plaintiff pled acts and misrepresentations comprising fraudulent concealment.

With respect to evidentiary support for purposes of summary disposition, in reviewing a motion under MCR 2.116(C)(7), the allegations in the complaint are accepted as true unless contradicted by documentary evidence submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). No documentary evidence was attached to defendant's lower court briefs regarding summary disposition; thus, the factual allegations in the complaint are accepted as true. And, as noted above, the allegations sufficiently referenced acts and misrepresentations that comprise fraudulent concealment. Moreover, the evidence is indisputable that defendant was convicted of the murder, that he did not reveal or disclose any involvement in the murder and avoided prosecution, and that the murder conviction occurred nearly twenty years after the murder was committed. There is no genuine issue of fact concerning the existence of fraudulent concealment. Indeed, in defendant's summary disposition brief, he conceded that plaintiff "had up until July 20, 2002[,] to file any wrongful death claim based on fraudulent concealment." Defendant was arrested for the murder in July 2000.

Nevertheless, the trial court's determination that the date of defendant's conviction is controlling for purposes of the fraudulent concealment statute does not find support in the law. MCL 600.5855 provides that the two-year time period begins when a person "discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for

the claim . . . .” Contrary to the trial court’s reasoning, it cannot be said that a plaintiff “should have discovered . . . the identity of the person who is liable for the claim” only at a point in time when a finder of fact is convinced of the person’s identity as the perpetrator of a crime beyond a reasonable doubt. Where other requirements for fraudulent concealment are established, a plaintiff would be able to successfully argue that the two-year period does not begin until there is certainty beyond a reasonable doubt of the wrongdoer’s identity. This level of certainty is not reflected in this Court’s decisions addressing the statute. See, e.g., *Witherspoon v Guilford*, 203 Mich App 240, 248-249; 511 NW2d 720 (1994)(rejecting fraudulent concealment where the defendant driver’s name and description were in a police report and “her identity and potential for liability were therefore discoverable from the outset.”)

Regardless whether the two-year window found in the fraudulent concealment statute commenced in July 2000 on defendant’s arrest, as maintained by defendant, or in August 2000 when the district court bound defendant over to the circuit court after making the requisite probable cause finding, the initiation of the suit at bar on October 4, 2002, was untimely taking solely into consideration the general statute of limitations for wrongful death, MCL 600.5805(10), and the fraudulent concealment statute, MCL 600.5855.<sup>2</sup> Nonetheless, we conclude that MCL 600.5852 saves plaintiff’s cause of action.

MCL 600.5852 provides:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

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<sup>2</sup> We also reject plaintiff’s alternative argument that the action was timely under the discovery rule. Generally, a claim accrues at the time of the wrong. MCL 600.5827. Where an element of a cause of action has occurred, but cannot be pleaded in a proper complaint because it is not yet discoverable with reasonable diligence, courts have applied the discovery rule. *Travelers Ins Co v Guardian Alarm Co of Michigan*, 231 Mich App 473, 479-480; 586 NW2d 760 (1998). Under this rule, a claim accrues when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997); *Moll v Abbott Laboratories*, 444 Mich 1, 23-25; 506 NW2d 816 (1993). Significantly, the rule does not pertain to discovering the identities of all possible parties. *Brown v Drake-Willock Int’l, Ltd*, 209 Mich App 136, 142; 530 NW2d 510 (1995). “Our courts consistently have held that the statute of limitations is not tolled pending discovery of the identity of the parties where all the elements of the cause of action exist.” *Id.* In this case, the elements of the cause of action were apparent when plaintiff’s decedent was shot and killed in 1982. Thus, contrary to plaintiff’s discovery rule argument, the statute of limitations was not tolled until defendant’s identity as the perpetrator was ascertained.

Here, the deceased died before the period of limitations elapsed. Furthermore, plaintiff, as personal representative, obtained letters of authority on October 4, 2002, which is the date the suit was commenced, thereby satisfying the requirement that an action be initiated within two years after letters of authority are issued. The fact that the letters of authority issued in 2002 related to a death that occurred as far back as 1982 is irrelevant under our Supreme Court's ruling in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003). The *Eggleston* Court, construing MCL 600.5852, ruled:

The Court [of Appeals held] that a personal representative must bring an action within two years after the initial letters of authority are issued to the first personal representative. This is not, however, what the statute says. The statute simply provides that an action may be commenced by the personal representative "at any time within 2 years after letters of authority are issued although the period of limitations has run." The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative.

Plaintiff was "the personal representative" of the estate and filed the complaint "within 2 years after letters of authority [were] issued," and "within 3 years after the period of limitations ha[d] run." MCL 600.5852. The action was therefore timely. [*Eggleston, supra* at 33 (citation omitted; alteration in first paragraph added).]

In the case at bar, plaintiff is the personal representative, and he filed the complaint within two years after letters of authority were issued. Accordingly, there was compliance with this statutory requirement.<sup>3</sup>

We now tackle the language of MCL 600.5852 that requires the action to be brought "within 3 years after the period of limitations has run." The general period of limitations, three years under MCL 600.5805(10), elapsed in 1985, giving the estate until 1988 to file suit under § 5852; this was not accomplished. However, § 5852 does not provide that a personal representative must file suit within three years after the "general" period of limitations has run. The statute simply says that the action must be commenced "within 3 years after *the* period of limitations has run." (Emphasis added). In *Miller v Mercy Mem Hosp*, 466 Mich 196, 202; 644 NW2d 730 (2002), the Michigan Supreme Court held that § 5852's reference to "the" period of limitations does not limit or qualify which period applies, the period rooted in MCL 600.5805, or the six-month discovery period in MCL 600.5838a(2), which was at issue in *Miller*, a medical malpractice action. "As a saving statute, § 5852 applies to whatever period of limitation is or may be applicable in a given case[.]" *Miller, supra* at 202. The Court further reasoned:

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<sup>3</sup> If in fact a probate estate was opened immediately following decedent's death, the record does not reveal the nature and circumstances of the probate action. Regardless, the information is unnecessary for purposes of our analysis.

Contrary to defendants' assertions, the six-month discovery rule is a distinct period of limitation. It is a statutory provision that requires a person who has a cause of action to bring suit within a specified time. As an alternative to the other periods of limitation, it is itself a period of limitation. [*Id.*]

Likewise, the fraudulent concealment statute, MCL 600.5855, contains a distinct two-year limitations period that is an alternative to MCL 600.5805. Because of the applicability of the fraudulent concealment statute, the period of limitations did not run until July 2002, assuming that it commenced as early as July 2000 when defendant was arrested.<sup>4</sup> Applying § 5852, three additional years are added from July 2002, during which period the personal representative, plaintiff, could initiate the action, as long as he was issued letters of authority within two years of the suit's commencement as is the case. Accordingly, plaintiff's action was timely and not time-barred.

With respect to defendant's civil liability, we find no error in the trial court's order granting summary disposition in favor of plaintiff. Defendant did not dispute the fact of his conviction for the murder of plaintiff's decedent. Although he claims on appeal that the evidence supporting the conviction was untrustworthy, he failed to present any documentary evidence to the trial court to show that there was a genuine issue of material fact regarding his liability. MCR 2.116(C)(10); *Maiden, supra* at 120. Accordingly, the trial court could properly conclude that plaintiff was entitled to summary disposition on the issue of liability in light of the criminal conviction for murder. See *Waknin v Chamberlain*, 467 Mich 329, 332-336; 653 NW2d 176 (2002)(criminal conviction after plea or trial constitutes admissible substantive evidence of conduct at issue in a civil case arising out of the same transaction).<sup>5</sup>

Finally, we address the issue of damages. Plaintiff had not requested that the trial court determine damages. The record indicates that the trial court acted after an unrecorded sidebar conference with the attorneys. It is not clear that defendant had an opportunity to oppose the trial court's decision beforehand. There is no basis on which to conclude that defendant waived his right to a jury trial on the issue of damages by his conduct. See *Marshall Lasser, PC v George*, 252 Mich App 104, 107-109, 651 NW2d 158 (2002). We conclude that the trial court improperly determined damages in violation of defendant's right to a jury trial. Plaintiff filed a demand for a jury trial at the time the complaint was filed. The general jury demand is for all facts and issues, including damages. *Id.* at 106. Defendant was entitled to rely on that demand. *Id.* "Once the right to trial by jury was secured, plaintiff needed defendant's consent to waive or withdraw the right to have the jury hear and decide the issue of damages." *Id.* (citations omitted). The record does not show, and plaintiff does not assert, that defendant waived or

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<sup>4</sup> Even were we to go back to December 1999 when an individual informed police of defendant's involvement in the murder, and assuming knowledge, actual or constructive, on plaintiff's part, the outcome remains the same, i.e., the action was timely under § 5852.

<sup>5</sup> The *Waknin* Court stated that the fact that the "defendant was found guilty beyond a reasonable doubt – a standard of proof granting him protection greater than the preponderance of the evidence standard in the civil case – is highly probative evidence." *Waknin, supra* at 335-336.

withdrew his right to a jury trial on the issue of damages. Moreover, there was no documentary evidence that would support the damage award ordered by the trial court. Therefore, the trial court improperly determined damages. On remand, unless the parties agree otherwise, a jury shall determine the amount of damages.

Affirmed in part and reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ William B. Murphy

/s/ Mark J. Cavanagh